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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 STATE FARM FIRE AND CASUALTY,  
11 as subrogee for Catherine Robinson,

12 Plaintiff,

13 v.  
14

15 HELEN OF TROY, LLC, *et al.*,

16 Defendants.

Case No. C15-1771-RSM

ORDER ON MOTIONS IN LIMINE

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18 **I. INTRODUCTION**

19 This matter comes before the Court on Plaintiff State Farm Fire and Casualty as  
20 subrogee for Catherine Robinson (“State Farm”)’s Motions in Limine, Dkt. #70, and  
21 Defendants’ Motions in Limine, Dkt. #71. For the reasons set forth below, these Motions are  
22 GRANTED, DENIED, AND DEFERRED.  
23

24 **II. PLAINTIFF’S MOTION IN LIMINE**

- 25 1. Plaintiff first moves to preclude evidence regarding affirmative defenses that  
26 Defendants failed to plead or failed to provide a factual basis for after the Court’s  
27 December 21, 2016, Discovery Order. Defendants fail to respond to this Motion. This  
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1 Motion is GRANTED. Defendants may not present evidence or argument related to  
2 unpled or pled affirmative defenses.

3 2. Plaintiff next moves to preclude Defendants from calling witnesses not properly  
4 disclosed in initial disclosures, specifically John Weiss. The Court has already ruled  
5 that Mr. Weiss will not be excluded because of Defendants' failure to disclose. *See*  
6 Dkt. #76. Plaintiff provides no evidence that Defendants intend to call other witnesses  
7 that were not properly disclosed. This Motion is therefore DENIED.  
8

9 3. Plaintiff moves to exclude evidence about the lighter or pipe that was found in the  
10 debris of the house fire at issue in this case. Plaintiff argues that this Motion is moot if  
11 Plaintiff's Motion in limine no. 1 is granted. Because the Court has granted that  
12 Motion, this Motion is DENIED as MOOT. If for some reason this issue comes up at  
13 trial, the Court can rule on Plaintiff's FRE 403 arguments at that time.  
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15 4. Plaintiff moves to preclude reference to any testimony contained in the rebuttal report  
16 of Defendants' expert Mr. Way, dated February 2, 2017. Rule 26(a)(2)(D)(ii) is clear  
17 that any expert rebuttal reports must be submitted within thirty days of the other party's  
18 disclosure. Plaintiff argues that Mr. Way's report was due on January 27, 2017, and  
19 was therefore untimely. Plaintiff argues that, by not timely issuing his report, Way  
20 gained a "tactical advantage – he was able to review, consider, and rebut, [Plaintiff's  
21 expert] Barovsky's rebuttal report." Dkt. #70 at 12. Defendants fail to respond. The  
22 Court agrees that Defendants violated Rule 26 and that this prejudiced Plaintiff. This  
23 Motion is GRANTED.  
24

25 5. Plaintiff moves to exclude reference to the home not having a fire extinguisher or any  
26 issue regarding the smoke alarm. Plaintiff does not cite a rule of evidence, but appears  
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1 to argue on 401 relevancy grounds. The Court agrees that there is no allegation that the  
2 lack of a fire extinguisher or fire alarms caused the fire. This evidence could support a  
3 failure to mitigate defense, however the defenses are excluded as stated above.  
4 Defendants do not respond to this Motion. Accordingly, this Motion is GRANTED.

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6 6. Plaintiff moves to preclude Defendants from referencing any of their past successes in  
7 defending similar claims. Defendants fail to respond. This Motion is GRANTED.

8 7. Plaintiff moves to preclude Defendants from referencing Plaintiff's failure to call any  
9 witnesses equally available to Defendants. Defendants fail to respond. This Motion is  
10 GRANTED.

11  
12 8. Plaintiff moves to "be granted permission to anticipate and discuss Defendants'  
13 defenses during opening statements." Dkt. #70 at 14. Defendants fail to respond. The  
14 Court has already ruled that Defendants may not present their affirmative defenses  
15 given their failure to respond to discovery. Other than those defenses, it is unclear what  
16 Plaintiff is referring to in this Motion. Certainly, Plaintiff may discuss the evidence that  
17 it reasonably anticipates Defendants will present at trial. This Motion is DEFERRED.  
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### 19 **III. DEFENDANTS' MOTIONS IN LIMINE**

20 The Court will first address the so-called "Agreed Motions in Limine," Defendants'  
21 Motions in limine 1-3 and 5-6. These Motions cite settled and well-understood law that apply  
22 to every insurance case. Local Rule 7(d)(4) directs the parties to meet in good faith in an effort  
23 to *resolve* which matters are in dispute. As such, the Court expected the parties to have  
24 resolved these issues without needing the Court's intervention. However, for clarity the Court  
25 will grant these Motions. Defendants' Motions 1-3 and 5-6 are GRANTED.  
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- 1 4. Defendants move to exclude argument requesting jurors place themselves in the position  
2 of Plaintiff. Dkt. #73 at 3 (citing *Chicago & N.W. R. Co. v. Kelly*, 84 F.2d 569, 576 (8th  
3 Cir. 1936)). Plaintiff opposes this Motion in part. This Motion is GRANTED. The  
4 parties are precluded from making any argument urging jurors to “place themselves in  
5 the position of one of the parties to the litigation, or to grant the party the recovery they  
6 would wish themselves if they were in the same position.”
- 7  
8 7. Defendants move to exclude references to motions in limine or other pre-trial motions or  
9 rulings. Plaintiff opposes this Motion solely because the Court has ordered that the jury  
10 will be given an adverse inference instruction referencing the Defendants’ violation of a  
11 Court Order. The Court agrees with Plaintiff. This Motion is DENIED. However, any  
12 reference to other pre-trial rulings would likely be in violation of FRE 401 – 403.
- 13  
14 8. The parties agree to exclude references to litigation expenses. This Motion is  
15 GRANTED.
- 16  
17 9. The parties agree to exclude witnesses from the Courtroom, however, Plaintiff argues  
18 that one of its witnesses, Bill Etcheverry, will also be State Farm’s representative at trial.  
19 This witness may be present in the courtroom. This Motion IS GRANTED IN PART  
20 with respect to all other witnesses.
- 21  
22 10. Defendants move to exclude “legal opinions as to the ultimate issues of law in this  
23 case.” Plaintiff essentially agrees but argues that “Defendants’ legal opinions are based  
24 upon factual opinions which experts are entitled to testify regarding...” Dkt. #84 at 4.  
25 The Court finds that Defendants are not moving to exclude *all* expert opinions, just  
26 those as to the ultimate issues of law in this case. This Motion is GRANTED.
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1 11. Defendants move to exclude cumulative and repetitive witness testimony. The Court  
2 will defer ruling on this based on the testimony presented at trial. This Motion is  
3 DEFERRED.

4 12. The parties agree to exclude evidence or testimony relating to other products or other  
5 claims against Defendants. This Motion is GRANTED.

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7 13. The parties agree to exclude any evidence or testimony regarding the cats in the house  
8 fire. This Motion is GRANTED.

9 14. Defendants move to prevent the jury from taking into the jury room “interrogatory  
10 answers, responses to requests for production and response to requests for admission,”  
11 citing only FRE 401-403 and Rule 33(e). These rules do not prohibit the use of  
12 discovery materials at trial or prohibit the jury from taking them into the jury room.  
13 Defendants fail to provide specific examples for the Court to understand what is  
14 objectionable. This Motion is DENIED.

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16 15. Defendants move to preclude Plaintiff from using the term “defect” at trial without  
17 proper foundation. Plaintiff agrees that testimony needs to be elicited prior to a properly  
18 qualified expert offering any opinion as to defective design or defective construction.  
19 The Court does not interpret Defendants’ Motion from precluding Plaintiff from using  
20 the term “defect” in opening or closing argument. This Motion is GRANTED.  
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#### 22 **IV. CONCLUSION**

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24 Having reviewed the relevant briefing and the remainder of the record, the Court hereby  
25 finds and ORDERS that Plaintiff and Defendants’ Motions in limine are GRANTED, DENIED,  
26 AND DEFERRED as stated above.  
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1 DATED this 14 day of June, 2017.

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4 RICARDO S. MARTINEZ  
5 CHIEF UNITED STATES DISTRICT JUDGE  
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